No. 2311

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALASKA TREADWELL GOLD MINING COMPANY (a Corporation), Et Al.,

Appellants,

vs.

ALASKA GASTINEAU MINING COMPANY (a Corporation),

Appellee.

APPELLANTS' REPLY TO APPELLEE'S PETITION FOR A REHEARING.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Counsel for Appellants.

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By ....., Deputy Clerk.

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Counsel for appellee have filed a petition asking that the decision of this Court made herein on May 18th, 1914, be set aside and a rehearing granted for the reason (as appellee asserts) that this Court, *without discussing or deciding two of the three vital points in the case,* ordered a dismissal of plaintiff's (appellee's) bill.

The petitioner sets forth (page 2) that the appellee in its bill claimed:

> "First: That the appellants were not delivering to it an uninterrupted current.
> "Second: That it was entitled to a real current and not to a theoretical current; and
> "Third: That the appellants should furnish current enough to overcome the inertia of the machinery of the appellee so that it could utilize the 300 horse-power."

We assume that the three points above stated are the "three vital points in the case" of which (as appellee claims) this Court decided only one, leaving the other two undiscussed and undecided. Upon this assumption we proceed to examine the decision referred to.

First: *That the appellants were not delivering to it an uninterrupted current.*

The decision states that:

> "The appellee was complainant in the court below and by its bill sought the specific performance of a written contract."

The decision embodies the contract *in extenso,* and contains a summary of the evidence applicable to the three "vital points" referred to by appellee.

From this summary of the evidence it appears that the parties to this litigation were operating under a contract by virtue of which defendant was obligated

to deliver to plaintiff a certain current of electricity. That on entering into this contract

> "the parties were dealing at arm's length, there being no valid ground for saying that the International Company acted upon the suggestion of Mr. Bradley (defendant's representative) that two hundred horse-power would be sufficient for the operation of its properties; on the contrary, it is undisputed that that company took the advice of Mr. Thane (plaintiff's own representative) in respect to the matter and acted in accordance with his recommendation in making the contract in question."

Referring to and construing this contract, the court decides:

> "Turning to the written contract, it is seen that what the appellee's predecessor in interest agreed to take and what the appellant companies agreed to deliver to it and its successors in interest was a current of not to exceed three hundred (300) electric horse-power which shall be taken from and at the generating plant to be installed upon the leased premises by the appellant companies. There is nothing in the written contract requiring the latter to deliver power. Indeed that is expressly conceded in the brief of appellee's counsel where it is said: Certainly no one contends that anything was to be delivered other than current but (they add) the question still remains open as to the quantity or volume of the current.
>
> "The difficulty in the way of the latter suggestion is that the written contract does not leave open the question as to the quantity or volume of the current for it expressly declares it to be a cur-

rent of not to exceed three hundred (300) electric horse-power."

This construction of the contract by the Court is a determination of the one pivotal and vital point in the case the decision of which necessarily comprehends a decision of the other two points referred to in Appellee's petition for rehearing. Proceeding further the decision of this Court disposes of the point firstly made by appellee's petition as follows:

> "The appellant companies by the written contract agreed to furnish a certain specified quantity of uninterrupted electric current *which the evidence shows they have done;* the development of power from that current was and is a matter for the appellee company over which the appellant companies have under the contract no control or concern."

This declaration of the decision seems to dispose conclusively of appellee's contention that the words "power" and "current" were intended to be interchangeably used by the parties because the Court upon consideration of the evidence and the record finds to the contrary. It may be that the two expressions are at times used interchangeably in colloquial diction, but the decision of this Court is that in the case at bar the parties did not so employ these expressions.

Second: *That appellant was entitled to a real current and not to a theoretical current.*

The parts of the decision quoted under the foregoing point appear to fully answer this contention, viz: The appellant companies by written contract agreed to furnish a *certain specified quantity of uninterrupted electric current which the evidence shows they have done.* The development of *power* from that *current* was and is a matter for the appellee company over which the appellant companies have under the contract no control or concern. Appellee asserts that appellants did not deliver a continuous current of 300 horse-power because a circuit breaker was placed on appellants' delivery wire (for the protection of the rest of their system) which circuit breaker shut off the current whenever appellee drew a current exceeding 300 horse-power. Appellees' contention on this point is based upon the theory that appellants were to blame because appellee, by seeking to take a current of more than 300 horse-power, through their own fault, in violation of their contract, themselves shut off the current. We submit that it requires no argument or authority to show that such a contention is without force.

Appellees' petition states:

> "The bill alleges that the appellants have so connected the power lines of the appellee with their generating plant that the current is frequently interrupted to the great loss of appellee

(Tr., pp. 23 and 24). On reference to these pages of the Transcript (pp. 23 and 24) this statement of the petition appears to be misleading. The allegations of the bill referred to are as follows:

"XIX

"The defendant corporations have so connected the plaintiff's power lines with their plant that they have placed it beyond the control of the plaintiff to prevent a momentary surge or current in starting their machinery which for an instant draws upon the general supply of electricity at said plant and causes the said circuit-breaker to break the circuit. That the defendants have adopted the following practice in order to harass and annoy the plaintiff in securing the power to which it is entitled: Whenever the circuit-breaker is driven out *by a momentary surge of current* the defendants refuse to replace the circuit-breaker in place immediately and restore the current, but prohibit their electricians at said plant who are amply competent for that purpose from replacing the circuit-breaker and restoring the current, and refuse to restore the circuit-breaker and current until they are informed at Treadwell, Alaska, a point at least two miles distant from their Sheep Creek power plant and across Gastineau Channel, an arm of the North Pacific Ocean, and then at their convenience send a man across Gastineau Channel in a small boat to restore the circuit-breaker to its place. Plaintiff alleges not only that it is entitled to a reasonable surge for the purpose of starting its machinery so as to consume the continuous current of three hundred horse-power which the defendants undertake to deliver in the said contract; but further allege that if plaintiff was absolutely restricted to an uninterrupted current of 300 horse-power and was provided with an uninterrupted

current of 300 horse-power, the machinery now installed at the Perseverance mine could be started and operated continuously and after the starting thereof much less than 300 horse-power would be consumed. Plaintiff alleges that it is the duty of the defendants to furnish a current of 300 horse-power in such a way that it will be uninterrupted and so divorced from the defendants' other supply of electricity at said plant, that the defendants will not be enabled to make the momentary and involuntary drawing upon said current a pretext for depriving the plaintiff of power.

"XX.

"The plaintiff alleges that the defendant corporations have not (16) since the 6th day of December, 1912, furnished to the plaintiff at any time the 300 horse-power called for in the said contract, and have failed, at all times, far short of delivery of the same; and further allege that the defendants have failed to provide them with an uninterrupted current of 300 horse-power, but have so arranged their connections with the plaintiff's power line that constant interruptions occur, and insist upon continuing the interruptions at their convenience.

"XXI.

"Plaintiff respectfully shows to this Court that unless a momentary starting surge sufficient to start the machinery of the plaintiff to a point that it will consume 300 horse-power at the power plant of the defendant corporations, is allowed to this plaintiff, that plaintiff will suffer irreparable injury and damage and that the spirit and intent of the contract herein set forth will be violated, and that the plaintiff will never be able to enjoy

an uninterrupted current of 300 horse-power under the contract as provided for therein."

It is manifest from these allegations of the bill that the breaks in the current complained of by plaintiffs were only such as were occasioned by the circuit-breaker when plaintiff overdrew its contract allowance for the purpose of securing additional current in excess of 300 horse-power for its starting surges.

Third: *That appellant should furnish current enough to overcome the inertia of the machinery of the appellee.*

This point is also fully disposed of by the decision of this Court, viz:

> "And we can see no just or legal ground upon which any court can read into the contract between these parties a requirement that in addition to a current of not exceeding three hundred horse-power the appellant companies shall also furnish such additional current as may be needed to start the old motors that had been used by the predecessor in interest of the appellee several years before the making of the contract or any other specific kind of motor."

Nothing we think need be added to this quotation.

The gist of appellees' petition for rehearing appears to be contained in the paragraph thereof which is in terms as follows:

> "The Court has disposed of the case by discussing and deciding only that the appellee is not

entitled to the surge, or extra momentary current, sufficient to start its machinery. *The Court has not discussed and it has not decided the right of the appellee to an uninterrupted current, nor the right of the appellee to serve actual instead of apparent current. Both rights are of vital importance to the appellee."*

We are at a loss to understand the contention of appellee that both the points referred to have not been fully and conclusively decided, since the decision in terms adjudges that appellants did deliver to appellee an uninterrupted current, according to the contract (see quotation from decision under point First), and that appellee is not entitled, under the contract, to starting surges (see quotation from decision under point "Third."

It may be that petitioner really means to complain because the Court failed to state each item of matter in the record and each rule of law by which it was induced to reach the conclusions specified in its decision, but surely no such complaint can justly be made in view of the extensive review of the record, conclusive of the case which is embodied in the decision.

We urge that the petition for rehearing be denied.

Respectfully submitted.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
Counsel for Appellants.